No. 14459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHSEL NAMKUNG,

Appellant,

vs.

JOHN P. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF SEATTLE, STATE OF WASHINGTON,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Section 2241, Title 28 U.S.C. and on this Court by Section 2253, Title 28, U.S.C.

STATUTE INVOLVED

In Section 243(h) of the Immigration and Nationality Act of 1952, Title 8 U.S.C., Sec. 1253(h) 66 Stat. 212, Congress has provided that:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such time as he deems necessary for such reason."

QUESTIONS PRESENTED

Whether the procedures followed by the Immigration Service in connection with the above statute denied appellant due process of law.

STATEMENT

Appellant, a native and citizen of Korea, last entered the United States at Anchorage, Alaska, on March 10, 1949, being admitted for permanent residence as a non-quota immigrant, to pursue the occupation of a professor. He had previously resided in this country during portions of 1947 and 1948 as a student.

Following appellant's arrest July 25, 1952, on a warrant of deportation charging that he was at the time of entry an alien affiliated with the Communist Party of the United States, a hearing was had and ap-

pellant was ordered deported on February 19, 1953. No appeal was taken administratively nor judicial review sought. It is conceded that appellant is deportable.

On October 8, 1953 appellant applied for a stay of deportation based upon the claim that he would be subject to physical persecution if deported to Korea. A hearing on this stay was held on December 2, 1953, at which time appellant was given an opportunity to present evidence in support of his claim. Appellant was represented by counsel at this hearing.

The record of the above mentioned hearing, together with the examining officer's summary and recommendation was forwarded to the Assistant Commissioner, Detention and Deportation Division on December 14, 1953. Thereafter on January 5, 1954, the examining officer forwarded for consideration, a letter from the Korean Consul General at San Francisco, to the effect that appellant would not be subject to physical persecution.

On February 15, 1954 the Assistant Commissioner ruled that "after careful consideration of the material the alien has submitted, and of his own testimony in support of his claim that he would be subject to physical persecution if deported to Korea, it is

not my opinion that the alien would be subject to physical persecution if deported to that country."

Oral notification was given to appellant on February 19, 1954, and thereafter appellant was surrendered into custody on March 25, 1954, on the same day that this proceeding was initiated below. After hearing on June 3, 1954 appellant's petition for a writ of habeas corpus was denied.

Notice of appeal to this court was filed on July 2, 1954.

SUMMARY OF ARGUMENT

Much of appellant's brief is devoted to the proposition that as an alien, he is entitled to the protection of the Fifth Amendment, both as to deportation proceedings and also those ancillary proceedings, in the instant case the granting or denying of suspension of deportation, which are discretionary in nature. Appellee freely admits that the procedural due process provided by the Fifth Amendment is applicable to the procedures in issue in this case.

The whole controversy here concerns the degree of administrative nicety which is required to comply with "substantial due process". Specifically, appellant charges a denial of due process in two actions taken

by the Service in connection with appellant's application for suspension of deportation.

First, appellant charges that the forwarding to the Assistant Commissioner and his alleged consideration thereof, of a letter from the Korean Consul General pertaining to appellant, was error. The theory being that the consideration of any evidence by the Service, received after having concluded hearings, without permitting the alien an opportunity to challenge said evidence, is error.

Appellee's position herein is, that the due process required by the Fifth Amendment must be consonant with the type of proceeding being conducted. In the instant case the relief requested is essentially discretionary in nature and as such, appellee must be permitted some latitude in the evidence considered, particularly where that evidence is not shown to be crucial, so long as the essential fairness of the proceedings is safeguarded. *Dolenz v. Shaughnessy*, 200 F. 2d 288, (2 Cir.).

Appellant's other basic contention is that the summary and recommendation made by the examining officer, a procedure normally followed in deportation hearings, deprived the Assistant Commissioner of his power to make an independent decision as to the exercise of his delegated discretionary power. It is

further claimed that this officer's opinion was given in violation of regulations provided by the Commissioner, simply because it was not expressly therein required.

Again, appellee submits that due process requires reasonableness in the circumstances. The giving of a recommendation by a subordinate cannot be said to so prejudice the mind of the person ultimately charged with the responsibility of decision, that he is prevented from exercising independent discretion. Many examples of administrative action can be found where a subordinate collects the factual information, digests same and submits an opinion with the material to the person on whom ultimate responsibility for decision rests.

The question of whether alleged action or inaction amounts to a denial of due process must be considered in light of the whole proceedings, their purpose and the ultimate result. Where the relief sought from an administrative agency is wholly discretionary in nature, and where no procedural regulations of that agency have been violated; an injured person must show that the agency action is foreign to normal standards of fairness and so vital to the decision made, that it prevents or pervades the exercise of the required discretion.

ARGUMENT

I.

IN REQUEST FOR DISCRETIONARY RELIEF, ALL RELEVANT TESTIMONY SHOULD BE CONSIDERED

Section 1253(h) of Title 8, U.S.C. Immigration and Nationality Act of 1952, clearly provides that the withholding of deportation on the ground of a physical persecution shall be discretionary. The phrases: "is authorized to withhold", "in his opinion", and "for such time as he deems necessary" can only be interpreted as requiring the exercise of discretion in a very broad sense. This interpretation is confirmed by the decision of the Second Circuit in the second Dolenz case, *Dolenz v. Shaughnessy*, 206 F. 2d 392, 394.

In aid of the exercise of the above described function, regulations were promulgated, 8 C.F.R. 243.3(b), which provided in Section 243B that a request for a stay by an alien to the district director, should be in writing and supported by an affidavit setting forth the reasons for request and such other evidentiary matter as may support the request. It was further provided in that section, subhead (2) that the alien *may* be required to submit to interrogation under oath, with a view to necessary explanation, of his claims or of the evidence which he has furnished and the estab-

lishment of the pertinent facts upon which a determination may be made in his case.

Thus we see an additional discretionary element, the permission to require aliens to appear for interrogation. Appellant not only does not dispute the validity of the above regulation but relies upon it as implying a requirement that no evidence not offered by the Government at that hearing, if one is held, can be considered by the person exercising discretion. Where the regulation does not require that all, or even any evidence, be presented by the government at this hearing and in fact the regulation does not even require a hearing, it is difficult to understand appellant's reliance thereon.

Appellant's contention that the receipt of the letter from the Korean Consul General subsequent to his interrogation, and its submission to and presumed consideration by the Assistant Commissioner was a denial of due process, must be considered against the background of a discretionary function, and the absence of any regulations pertaining in any way to this alleged error.

The concept "due process" has a great variety of meanings depending on the fact situation in question. This was explained in *Whitfield v. Hanges*, 222 Fed. 745 8 Cir.), also a case where the fairness of a

hearing was in question and the court said that one of the indispensable requisites of procedural due process was the principle, "That the course of the proceeding shall be appropriate and just to the party affected."

In a case identical insofar as the facts and applicable statute are concerned, to this one, *Dolenz v. Shaughnessy*, supra, at page 394, the Second Circuit stated:

> "Doubtless a court might intervene to stay deportation if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien."

Although the *Dolenz* case, supra, was considering the use of confidential information, the court also said at p. 395:

> "We believe Congress intended the Attorney General to use whatever information he has."

Two concepts must be correlated in cases of this type. First, what are the requirements of reasonableness needed to fulfil procedural due process, and secondly, what is the available scope of judicial review of the discretionary administrative proceeding in which the alleged failure of due process is in issue.

In the *Dolenz* case, supra, the Court said at page 394 that:

> "That section (1952 Act provision) modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. *The courts may not substitute their judgment for his.*" (Emphasis supplied)

And again at page 395, the court said

> "Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude."

In effect, the court in the *Dolenz* case has held, not only that the determination of the issue of persecution requires discretion of an administrator, which discretion must be based on all the information available to him from any source, whether political, confidential or merely from current sources such as newspapers, etc., but also that the fairness of procedural due process has been met when the opportunity to present evidence has been granted to the alien and such further opportunity to explain his evidence as is considered necessary by the regulations of the Service is granted.

Congress saw fit to rest the suspension of deportation wholly on the discretion of the Attorney

General. The statutory provision permitting this discretionary action is silent on the procedure to be required. The regulations promulgated thereunder do not contemplate a litigious type of hearing. Could Congress have expected a judicial type of proceeding in which the reports of all government agencies having contact with the foreign country involved would be bared. Deportation statutes have always expressly provided for a more formal procedure, and surely Congress was aware of that situation. Deportation, as an example, rests on a concrete fact situation that has already occurred and can usually be rigidly applied to the particular alien in question. Fear of persecution on the other hand is entirely supposition and hypothesis and as is so often stated by Jurists, a court will not consider a hypothetical matter which is rooted in speculation and conjecture. Nor should the courts compel an administrator who is faced with this hypothetical problem, to restrict his area of decision to that evidence which could be presented in an adversary judicial hearing.

Additionally, does due process require the Attorney General to ignore knowledge or information known to him because it is not presented at a hearing, even if presentation at a hearing would serve no purpose? For example, should cross examination of a

foreign ambassador be required; would it serve any useful purpose?

The decision of the Attorney General's representative will be difficult at best due to the lack of normal sources of information from countries where persecution might be present. Often his decision will of necessity be based on little more information than that available to qualified foreign correspondents. Should the courts attempt to restrict his power to consider all available information?

In the instant case it should be presumed that reports of many government agencies pertaining to the situation in Korea were utilizied, that newspaper and periodical articles were checked. The letter from the Korean Consul General must have been but one small part of the evidence available in this case and may well, under the circumstances, have been given little or no weight. There is no showing in the record to the contrary.

II.

DOES DUE PROCESS PROHIBIT A SUBORDINATE'S ATTEMPT TO AID A SUPERIOR, CHARGED WITH A FINAL DECISION, BY SUMMARIZING AND MAKING RECOMMENDATIONS OF EVIDENCE?

The appellant claims that the proceeding is infected with unfairness because a regulation has been

violated and he cites cases to substantiate this point. He fails to point out, however, that the statute and the regulations are silent on whether or not a summary should be made by a subordinate and forwarded to the Attorney General or the person acting in his stead. He assumes that because the statute and regulations are silent such action is prohibited. Therein lies the infirmity of his argument. The cases cited by the appellant, without exception, present a situation where a regulation is promulgated for the purpose of insuring due process or essential fairness in administrative procedure. When the agency fails to adhere to the regulations it also fails to accord due process. Here the subordinate did more than required, not less than required.

The practice of summarizing evidence in administrative proceedings has become an accepted practice under administrative law. The principle is so firmly established that it requires no citation of authority. It is academic. Indeed, Congress has embodied such practice in the Administrative Procedure Act in Section 8 thereof (5 U.S.C.A. 1007). It has been always considered an aid to due process not a deterrent. Certainly such an approved procedure could not be unfair merely because it was resorted to in the absence of regulations requiring it. 18 A.L.R. 2d 626, p. 11.

The procedure, then, not being unfair, the only area of unfairness must be in the manner in which the hearing was summarized. Here, too, the appellant relies on an assumption not supported by the record. Without any basis in fact, he asserts that the Attorney General or his agent, did not give any independent consideration to the evidence submitted but blindly followed the summary and recommendation of the subordinate. In the absence of evidence to the contrary it is presumed that the Assistant Commissioner considered the evidence and exercised his independent judgment. *Cunard S.S. Co. v. Elting*, 97 F. 2d 373, 18 A.L.R. 2d 625, 42 Am. Jur. 680, Public Administrative Law, Section 240.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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